86-1540

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH CATHEY

Petitioner.

VERSUS

STATE OF LOUISIANA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF LOUISIANA, FIFTH CIRCUIT

JACOB J. AMATO, JR.
DAVID W. BIRDSONG
AMATO & CREELY
P. O. Box 441
Gretna, Louisiana 70054
Telephone: (504) 367-8181

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. WHETHER THE HEARSAY STATEMENTS OF A MINOR WHO FAILED TO TESTIFY PRESENTED PROBABLE CAUSE TO ENTER AND SEIZE DEFENDANT'S APARTMENT A WARRANT OR THE DEFENDANT'S CONSENT.

2. WHETHER THE DEFENDANT WAS COERCED INTO GIVING HIS CONSENT TO SEARCH HIS APARTMENT SUCH THAT THE CONSENT WAS NOT FREELY AND VOLUNTARILY GIVEN.

3. WHETHER THE PREJUDICIAL COMMENTS HADE BY THE TRIAL JUDGE WERE SUFFICIENT TO DECLARE A MISTRIAL UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

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CITATIONS AND AUTHORITIES

AUTHORITIES (continued)

Joseph Cathey, petitioner herein, through undersigned counsel, prays that a writ of certiorari be issued to the Fifth Circuit Court of Appeals of the State of Louisiana to review the judgment and opinion rendered in case no.: 86-KA-111, on August 25, 1986.

OPINIONS BELOW

There was no formal opinion of the Twenty-Fourth Judicial District Court of Louisiana, from which this proceeding emanates. Excerpts of the transcript in that Court, including the Judge's statements denying defendant's various motions and minute entries representing the same are reproduced in Appendix B of this petition.

The opinion of the Fifth Circuit Court of Appeals for the State of Louisiana has not been reported at this time but is reproduced in Appendix A to this petition. Application by the defendant for supervisory writs to the Louisiana Supreme Court were denied without comment on January 23, 1987, the minute entry representing the same is reproduced as Appendix C to this petition.

JURISDICTION

The opinion and order of the Fifth Circuit Court of Appeals of the State of Louisiana were entered on August 25, 1986. On January 23, 1987, the Louisiana Supreme Court denied petitioner's application for supervisory writs of certiorari, prohibition and mandamus. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(c), because a title, right, privilege or immunity was claimed under the Constitution of the United States, which claim was denied by the Fifth Circuit Court of Appeals of Louisiana.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves sections of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. These Amendments are reprinted in pertinent part in Appendix D attached hereto.

STATEMENT OF THE CASE

On May 3, 1983, the defendant, Joseph Cathey, a licensed horse trainer, was arrested at his mobile home located on the premises of Jefferson Downs Race Track in the Parish of Jefferson, State of Louisiana. Mr. Cathey requested an attorney several times both at his mobile home and later when he was taken to his apartment. When Tonia Nolan, a co-defendant in the District Court who lived with Mr. Cathey, and who was an employee of Jefferson Downs Race Track, heard that Mr. Cathey was under arrest, she attempted to go to the apartment they shared off of the Jefferson Downs premises to confirm whether their apartment was indeed "surrounded", as she had been told. Without any knowledge of Ms. Nolan's actions, Sargeant DeSalvo of the Jefferson Parish Sheriff's Office sent two (2) officers to the apartment shared by Mr. Cathey and Ms. Nolan to "secure" it. The officers of the Jefferson Parish Sheriff's Office entered the premises and walked through the apartment searching it for any persons that may be hiding there. Upon her arrival at the apartment, Ms. Nolan found the policemen already inside and thereafter she was not allowed to leave. When Ms. Nolan and the officers were inside the apartment they asked her permission to search but she refused. Mr. Cathey was brought to the apartment in the company of three (3) officers of the Jefferson Parish Sheriff's Office who, along with the other two (2) officers

already present in the apartment and the officers assigned to the case and representatives of the Louisiana State Police numbered approximately six (6) or seven (7) law enforcement officials in Mr. Cathey's apartment at that time. Mr. Cathey was told that Ms. Nolan would not be arrested if he consented to a search of the apartment and after being in ppolice custody for some time, he agreed. The search of the apartment turned up a footlocker containing medicines used in conjuinction with the treating of horses and the two (2) controlled dangerous substances Mr. Cathey was charged with possession of herein.

HOW THE FEDERAL QUESTIONS WERE RAISED AND PASSED UPON

On June 10, 1983, a Bill of Information was filed against Tonia Nolan and Joseph Cathey charging them with two (2) counts of violating Louisiana Revised Statuttes 40:967, the first count being possession of hydromorphine (dilaudid), and the second count being possession of methidine (demoral). The first federal questions were presented when the defendants moved to suppress the admission of any evidence concerning the drugs themselves due to an illegal search and seizure. This hearing was held on May 14 and 15, 1984 and the Motion to Suppress was denied. The defendant then sought supervisory writs on the denial of the motion to suppress. The writs were refused by both the Fifth Circuit Court of Appeals and the Supreme Court of Louisiana, both stating that adequate review would be had on appeal.

On May 1, 1985, the defendant's trial began with the defendant's attorney raising federal questions and again moving to reconsider the motion to suppress in light of

petitioner's consent to search not being given willfully or voluntarily, or coming as a result of continued interrogation after petitioner had asked for an attorney and such request had been denied. The defendant's trial took place on May 1, 2 and 3, 1985 during which defendant's counsel lodged objections to the District Judge's conduct concerning comments he made in regard to testimony that was given. These objections were overruled by the trial judge. On May 3, 1985, the jury returned a verdict of guilty as charged on both counts against Mr. Cathey. The jury failed to reach a decision concerning defendant Tonia Nolan and the trial judge declared a mistrial as per the charges brought against her. Defendant, Joseph Cathey, subsequently filed a motion for a post verdict judgment of acquittal which was denied. On December 14, 1985, the defendant was sentenced to three (3) years in the custody of the Louisiana Department of Corrections at hard labor plus a fine of $5,000.00 and costs.

The defendant filed a motion for appeal and the matter was reviewed by the Fifth Circuit Court of Appeal for the State of Louisiana. A decision therein was handed down on August 25, 1986, affirming the decision of the lower court. A motion for rehearing was filed which was then denied on September 17, 1986. On October 17, 1986, an application for supervisory writs of certiorari, prohibition and mandamus was filed with the Supreme Court for the State of Louisiana, On January 23, 1987, the Supreme Court of the State of Louisiana denied defendant's application.

The defendant's constitutional rights were therefore argued before the Twenty-Fourth Judicial District Court and the Fifth Circuit Court of Appeals for the State of

Louisiana, with writs being sought from the Louisiana Supreme Court at the earliest and to the most comprehensive extent in the proceedings available to petitioner.

REASONS FOR GRANTING PETITION

I.

WHETHER THE HEARSAY STATEMENTS OF A MINOR WHO FAILED TO TESTIFY PRESENTED PROBABLE CAUSE TO ENTER AND SEIZE DEFENDANT'S APARTMENT WITHOUT A WARRANT OR THE DEFENDANT'S CONSENT.

On May 3, 1984, two (2) agents of the Jefferson Parish Sheriff's Office entered the apartment residence of Joseph Bradley Cathey, without a warrant and without Mr. Cathey's consent. The officers entered the apartment with the intent to "secure it", that is, to look where anyone may be hiding in the apartment. There is no dispute that the officers' actions were taken without a warrant and without Mr. Cathey's consent. Such action is in direct contravention of Mr. Cathey's federal and state constitutional rights. The protection of the right to privacy in a persons home is one of the bullworks of the U.S. Constitution. The Fourth Amendment to the United States Constitution clearly states:

> "The right of the people to be secure in their persons, *houses*, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon *probable cause* supported by oath or affirmation and particularly describing the place to be searched, and the persons or *things to be seized.*" (emphasis added)

Sargeant DeSalvo of the Jefferson Parish SHeriff's Office was conducting an investigation of the arrest of Mr. Cathey and desired to talk to Ms. Tonia Nolan with whom Mr. Cathey shared an apartment. After attempting to contact Ms. Nolan in her office with the racing commission at Jefferson Downs Race Track, he sent two (2) agents, LaChute and Pinnero, to the Appellant's apartment. The agents were sent to "secure" the apartment which, in the agents' minds, included getting inside the apartment. Agent LaChute testified that he thought the Sheriff's office was in the process of getting a warrant. At no time, however, was a warrant requested or obtained.

There is also no question that at the time Agents LaChute and Pinnero entered the apartment they had no information of any consent on the behalf of Mr. Cathey or Ms. Nolan which would allow them to enter the apartment. Once inside the apartment the agents went from room to room, opening closets, to make sure that no one was in the apartment. This action directly impinged on the defendant's right to be secure in his own home. In discussing the application of the Fourth Amendment of the United States Constitution to a home, this Honorable Court has stated:

> "Almost a century ago the Court stated in resounding terms that the principle reflected in the Amendment 'reached farther than the concrete form' of the specific cases that gave it birth and 'applied to all invasions on the part of the government and its employees of this sanctity of a man's home and the privacies of life." *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed.2d 746....
>
> As the Court reiterated just a few years ago, the 'physicial entry of the home is the chief evil

against which the wording of the Fourth Amendment is directed." *United States v. United States District Court,* 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.ED.2d 752." *Payton vs. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), at 100 S.Ct. pages 1379 and 1380.

The question presented herein is one this Court has examined in *Segura v. United States,* 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), concerning the "seizure" of a premises. While a persons privacy rights are different in regards to a seizure as opposed to a full blown search, some level of probable cause needs to be present prior to a warrantless seizure taking place. In *Segura,* supra, this Honorable Court stated:

> "We hold, therefore, that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents. We reaffirm at the same time, however, that, absent exigent circumstances, a warrantless search-such as that invalidated in *Vale v. Louisiana,* supra, [399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970)] 399 U.S., at 33-34, 90 S.Ct., at 1971-1972-is illegal." at page 104 S.Ct. 3389

The probable cause referred to by this Court in *Segura,* is not present in the case at bar. Absent any such probable cause the seizure of the defendant's apartment by the Jefferson Parish Sheriff's Office cannot be justified.

The only attempt at justification the Louisiana appellate court could find for this warrantless intrusion into the defendant's apartment was that it was necessary to prevent the possible destruction of evidence. In that regard

the Louisiana appellate court relied on the case of *State v. Bearden*, 449 So.2d 1109 (La. App. 5th Cir. 1984) writ denied, 452 So.2d 179 (La. 1984). *Bearden*, however, is readily distinguishable from the case at bar. In *Bearden*, the officers knew that people were inside the house and they had eyewitnesses testimony of actual samples of the drugs that were located in the house. No such probable cause was present prior to the Jefferson Parish Sheriff's Office entering Mr. Cathey's apartment and seizing it.

The Louisiana Appellate Court cited four (4) factors it relied upon to establish probable cause for the entry into the apartment. The first two of these factors are the same, the second factor merely repeating the first from another source. They are: (1) Agent Kratzburg testified that Jefferson officials received a complaint in reference to possible narcotics violations and sex crimes involving the defendant; (2) Colonel Miller testified that an investigation was proceeding with reference to a juvenile individual that was supposedly getting some drugs from an individual out at Jefferson Downs. Nothing in either of these two statements establishes probable cause to believe that any drugs would be found in the defendant's apartment. There is no evidence of anyone saying they saw drugs in Mr. Cathey's apartment. No evidence whatsoever is presented to lend any veracity to the statements by the police officers referred to by the appellate court. This information is not sufficient to support a warrantless seizure of the defendant's home.

The third factor the appellate court relied upon was: (3) that the defendant had given a juvenile a marijuana cigarette prior to his arrest. The defendant was indeed charged with the offense of distributing a controlled

substance to a minor, and tried on that charge, but was not convicted. This alleged act occurred at the defendant's mobile home, some distance from his apartment. After the defendant's arrest at his mobile home, it was completely searched by the Sheriff's Office and they failed to come up with any other contraband of any nature in Mr. Cathey's possession. Nothing in this allegation lends any credence to any belief that contraband would be found in the defendant's apartment.

Probable cause, as this Court set forth in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) rehearing denied 463 U.S. 1237, 104 S.Ct. 33 (1983), must be based on the totality of the circumstances surrounding the actions of the two (2) agents who entered Mr. Cathey's apartment without a warrant and without his consent. While *Illinois v. Gates,* supra, examined the role of a magistrate in granting a search warrant, the duty of a reviewing court in examining probable cause is the same.

> "The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of a reviewing court is simply to insure that the magistrate had a 'substantial basis for...concluding' that probable cause existed. *Jones v. United States,* 362 U.S., at 271, 80 S.Ct., at 736." *Illionis,* supra at page 103 S.Ct. 2332

Using this test, examining the totality of the circumstances, no veracity has been shown to support the statements cited by the appellate court. Had this

information been presented to a magistrate, he could not have made a "practical, common sense decision" that probable cause for finding any particular drug would be found in Mr. Cathey's apartment. The Sheriff's desire to enter Mr. Cathey's apartment to continue their investigation is insufficient to overcome the protections guaranteed to the defendant by the Fourth Amendment of the United States Constitution. The fourth factor relied upon by the apellate court was: (4) That the defendant's live-in girlfriend did not appear at the track for questioning when informed that the defendant had been arrested. While this might provide an exigent circumstance to take some action, exigent circumstances on their own, are insufficient to allow a seizure. The circumstances must follow the establishment of probable cause and be based on probable cause as set forth above, before it can be acted on by the Sheriff's Office in contravention of a citizen's Fourth Amendment rights. Absent probable cause, there is no evidence of contraband to be protected and no reason to enter and "secure" the defendant's house.

The only recourse available to the defendant is to request this Honorable Court to invoke the exclusionary rule and to supress the evidence found in the defendant's apartment subsequent to this illegal seizure. As set forth in *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) and *United States v. Crews*, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980), at page 100 S.Ct. 1249.

This Court must, therefore, to protect future such violations of citizens rights, define the actions of the Jefferson Parish Sheriff's Office of the State of Louisiana, of entering into a suspect's apartment without warrant or

consent or probable cause acting only on exigent circumstances, as an unconstitutional act, and reverse the District Court and Louisiana Appellate Court decisions and order the suppression of evidence obtained as a result thereof.

II.

WHETHER THE DEFENDANT WAS COERCED INTO GIVING HIS CONSENT TO SEARCH HIS APARTMENT SUCH THAT THE CONSENT WAS NOT FREELY AND VOLUNTARILY GIVEN.

The second issue on which the defendant requests this Court to review the actions of the appellate court concerns the coercion used to gain Mr. Cathey's consent to more formally search his apartment. The following are the facts set forth in testimony concerning the request made of Mr. Cathey by the police officials to search his apartment.

Once Mr. Cathey was brought to his apartment a number of policemen were already there. The number at times varied but it is known that at least six (6) or seven (7) policemen were in the apartment at one time or another. Mr. Cathey was in handcuffs and was surprised to find Ms. Nolan there in custody when he entered the apartment. Mr. Cathey testified he was told that if he signed the consent to search form that Mr. Nolan would not be arrested, which, as a promise made by the police officers, carries with it the implied threat that she too was to be placed under arrest. Only when placed in that position did Mr. Cathey finally agree to sign the consent to search form, with Ms. Nolan signing after the search had begun or had been completed. The defendant's actions cannot be held to be free

and voluntary. When questioned, Sargeant DeSalvo could not justify why he did not have Mt. Cathey sign a consent to search form at the race track before he was taken to his apartment. The officer stated he did not have a form with him at the time but could not identify where he later obtained one.

Jurisprudence clearly dictates that when a warrantless search has taken place the State has the burden of proving that a consent was given to search is excepted from the requirements of probable cause and a warrant, such consent requires the relinquishment of constitutional guarantees. It is encumbant upon the State to demonstrate that consent was free and voluntary. *United States v. D'Allerman*, 712 F.2d 100 (U.S.C.A. 5th Cir. 1983) cert. denied, 464 U.S. 899, 104 S.Ct. 254, 78 L.Ed.2d 240 (1983). The test set forth for examining the validity of a consent is similar to that set forth by ths Honorable Court, speaking through Justice Blackmun in *Brown v. Illinios*, 442 U.S. 590, 95 S.Ct. 45 L.Ed.2d 416 (1975), concerning whether a confession was given voluntarily:

> "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and confession, the presence of intervening circumstances,... and, particularly, the purpose and

> flagrancy of the official misconduct are all relevant." 95 S.Ct. at 2261-2262 (footnotes and citations omitted)

This same rule must be applied when determining if this consent to search was voluntary and of Mr. Cathey's free will or coerced and in violation of his Fourth Amendment rights.

A Louisiana case similar to the facts presented today which appllies the same general rule set forth above is *State v. Summers,* 440 So.2d 911 (La. App. 2nd Cir. 1983). In *Summers,* the Court cited the following factors as creating the coercive atmosphere in which the defendant's consent was not freely and voluntarily given. She was at all times under the direct supervision and control of two(2) police officers. She had seen her boyfriend arrested and taken into custody. She admitted she was scared and that the officers said they could get a warrant in 10-20 minutes and she would have to allow the search. The Court in *Summers* held:

> "Considering the intrusion of the initial illegal entry into Ms. Holloway's home, the short time between that entry and her signing of the consent to search during which she was under police control at all times, the intervening events and the other attendant circumstances mentioned above, we believe the initial illegal entry and search was instrumental in provoking Holloway's consent which was therefore not an act of her free will." *Summer,* supra at page 914.

The similarity of these facts and summaries and those before the bar on Mr. Cathey's behalf mitigate

toward a similar finding, that the consent to search was not free and voluntary. Mr. Cathey had been arrested away from his apartment, handcuffed and forcibly brought back to his apartment. Once there he discovered seven or eight police officers in the apartment with Ms. Nolan, with whom he shared the apartment. Ms. Nolan steadfastly refused to allow a search without first talking to Mr. Cathey. Ms. Nolen testified she was nervous and scared and Mr. Cathey testified that the police promised not to arrest Ms. Nolen if he consented to the search. These factors should be sufficient to show that the search was unconstitutional and that it resulted only from the coercion of Mr. Cathey and that the evidence obtained thereby must be suppressed.

The Fifth Circuit Court of Appeals for the State of Louisiana attempted to distinguish this case from *State v. Ragsdale,* 381 So.2d 492 (La. 1980), by inferring that *Ragsdale* only applies to an illegal entry but that the entrance by agents LaChute and Pinnero into the defendant's home was justified. The entry of the officers however, has no bearing on the validity of the consent by Mr. Cathey to search his apartment. He only knew that the officers had entered his apartment without his consent and their presence therein added to the "subtle coercion" applied against the defendant to get his consent to search. It is suggested that the defendant had nothing to gain by cooperating with the police.

By the police officers own testimony it was less than 10 minutes from the itme of their arresting Mr. Cathey and searching the mobile home, and their asking him for his consent to search the apartment. The shortness of this period of time, between his arrest and the granting of

consent, is one of the factors cited in *Brown v. Illionis,* supra. Mr Cathey was placed under arrest at his mobile home and taken to his apartment in handcuffs. The presence of all the different officers, their conduct and holding Ms. Nolen under arrest at Mr. Cathey' apartment while he was brought there, and the short period of time he was given from his arrest until the asking for the consent must tilt heavily away from finding any free and voluntary consent being given and this Court must protect Mr. Cathey's Fourth Amendment rights against an unreasonable search of his residence.

For the same reasons set forth above defendant also objected at trial to the admission of certain oral statements made by the defendant and testified to by Agent Kratzburg. Any such statements were made after the consent to search was coerced and as inculpable statements can only be admitted if it can be shown that they were freely and voluntarily made, as per *Brown v. Illinois,* supra. The statements relating to the whereabouts of the footlocker and the knowledge Mr. Cathey had concerning any drugs located in the footlocker, when introduced at trial of this matter were tantamount to a confession. As such, given all of the factors stated above, it was not given freely and voluntarily and those statements should also be inadmissible and suppressed.

III.

WHETHER THE PREJUDICIAL COMMENTS MADE BY THE TRIAL JUDGE WERE SUFFICIENT TO DECLARE A MISTRIAL UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The transcript of Mr. Cathey's trial, dated May 2, 1985, page 49, reveals a question asked by the Assistant District Attorney to Agent Kratzburg as to if Mr. Cathey or Ms. Nolan provided a prescription for either of the drugs found at that residence. Agent Kratzburg responded no and began to explain his answer relating a statement made by the defendant. Defendant's counsel had not received notice of the intent to use that statement and objected to it being admitted into evidence. Without the explination there is no foundation for the answer and so the whole answer must be stricken. The proper question would have been "Did you ask Mr. Cathey or Ms. Nolen if they had a prescription for these drugs." Rather than strike the entire answer, however, Judge LeBrun of the Twenty-Fourth Judicial District Court, of the State of Louisiana, at pages 50 and 51 of the transcript of May 2, 1985, admonished the jury to ignore the statement attributed to the defendant, but added:

> "But you do not necessarily have to disregard the fact that he had no prescription according to the testimony of the-no prescription was given to him or shown to him. Okay." page 51, lines 24-29, page 52, lines 1-2.

There was no foundation for the comments made by Judge LeBrun. The police officer did not testify as to whether he had inquired about a prescription. Judge LeBrun was making an assumption that was not properly before the Court when he made his comment. This is in direct violation of Louisiana Code of Criminal Procedure Article 727, which states:

> "The Judge in the presence of the jury shall not comment upon the facts of the case, either by

> commenting upon or recapitulating the evidence, repeating the testimony of any witness or givning an opinion as to what has been proved, not proved or refuted."

While it's true that a ruling on the admissability of evidence and remarks giving reasons for that ruling are usually not objectionable, they will be if the remarks are unfair or prejudicial. *State v. Toomer*, 395 So.2d 1320 (La. 1981). Such prejudicial comments violate defendant's constitutional Fifth Amendment rights to due process of law as applied to the States through the Fourteenth Amendment.

The defendant avers that Judge LeBrun's remarks were highly prejudicial. They went directly to the question of if the defendant had a justifiable reason for having the drugs in his possession. Any further evidence submitted on the question would have to have impeached not only the State's evidence but also the comments made by Judge LeBrun directly to the jury. There is a long standing rule that such error is fatal to the trial and this Court should have no choice but to reverse the defendant's conviction and declare a mistrial below.

> "Judicial comment upon the facts or the evidence in the presence of the jury is a non-correctable error which must result in mistrial or reversal. C.Cr.P. 772, C.Cr.P. 806, *State v. Lonigan*, 263 La. 926, 269 So.2d 816 (1972)" *State v. Brevelle*, 270 So.2d 852 (La. 1973) at pages 855 and 856.

The Louisiana Fifth Circuit Court of Appeals, on page 23 of its decision has stated "Here the trial court was attempting to explain to the jury that they could not consider as evidence what the defendant said about his failure

to provide a prescription but that they could consider the fact that there was no prescription." Both the District Court and the Appellate Court have gone beyond explaining what was and what wasn't admissible. The witness had been asked if either of the co-defendants had provided him with a prescription for the drugs that had been found. The witness answered no, and the remainder of his reply was struck. The trial court's comments, however, go beyond a mere statement that no prescription was provided, and stated that there was *no prescription at all.* No foundation had been laid as to whether there was or wasn't a prescription. The only testimony was that the agent was not shown any prescription. Such a blatant misrescitation of the testimony is prejudicial to the defendant by weighing heavily in favor of finding the defendant guilty in the minds of the jury. The Federal Fifth Circuit Court of Appeals in *United States v. Bates,* 468 F.2d 1252 (5th Cir. 1972), speaking on prejudicial comments made by a judge to the jury during a trial, stated:

> "It was for the jury to determine which of the witnesses' stories would be given credence or indeed whether the witness would be believed at all. The comments by the trial judge clearly infringed upon the juries credibility determining process and appellant was thereby deprived of a fair trial. See *Bursten v. United States,* 5th Cir. 1968, 395 F.2d 976)" at page 1255

Such a deprivation of a fair trial demands that a mistrial be declared and this matter be remanded back to the State District Court for further proceedings.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari to the Fifth Circuit Court of Appeals of the state of Louisiana be granted and further briefs submitted and oral arguments had before this Honorable Court.

Respectfully submitted,

AMATO & CREELY

JACOB J. AMATO, JR.
DAVID W. BIRDSONG
901 Derbigny Street
P. O. Box 441
Gretna, Louisiana 70054
Telephone: (504) 367-8181
Attorneys for Relator,
Joseph Cathey

PROOF OF SERVICE

I, JACOB J AMATO, JR., one of the counsel of record for Joseph Cathey, depose and say that on the 20th day of March, 1987, I served three (3) copies of this Petition for Writs of Certiorari on an Assistant District Attorney for the Parish of Jefferson, State of Louisiana, by hand.

All parties required to be served have been served.

JACOB J. AMATO, JR.
AMATO & CREELY
901 Derbigny Street
P. O. Box 441
Gretna, Louisiana 70054
Telephone: (504) 367-8181

SUBSCRIBED AND SWORN TO BEFORE ME, AT GRETNA, LOUISIANA THIS 23rd DAY OF MARCH, 1987.

NOTARY PUBLIC

APPENDIX A

STATE OF LOUISIANA	:	No. 86-KA—111
VERSUS	:	COURT OF APPEAL
JOSEPH CATHEY	:	FIFTH CIRCUIT
	:	STATE OF LOUISIANA

APPEAL FROM THE TWENTY—FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, NO. 83-1875, DIVISION "I", HONORABLE WALLACE C. LEBRUN, JUDGE

: : :

EDWARD A. DUFRESNE, JR.
JUDGE

AUGUST 25 1986

: : :

(Court composed of Judges Lawrence A. Chehardy, Charles Grisbaum, Jr. and Edward A. Dufresne, Jr.)

JOHN M. MAMOULIDES, DISTRICT ATTORNEY, For Plaintiff-Appellee
DOROTHY A. PENDERGAST, ASSISTANT DISTRICT ATTORNEY
Office of the District Attorney
24th Judicial District
Parish of JEFFERSON
New Courthouse Annex
Gretna, La. 70053

JACOB J. AMATO, JR. For Defendant-Appellant
DAVID W. BIRDSONG
901 Derbigny Street
P. O. Box 441
Gretna, La. 70054

AFFIRMED

The defendant was charged with possession of hydromorphine and possesstion of pethodine in violation of R.S. 40:967. After preliminary motions the defendant proceeded to trial by a six-person jury. He was found guilty as charged and was sentenced to three years at hard labor, a $5,000.00 fine and various court costs on count one and was further sentenced to three years at hard labor on count two to run concurrent with the sentence imposed in count one.

From this conviction and sentence the defendant has appealed on the basis of the following fourteen assignments of error:

(1) Whether a warrant was issued to search the defendant's apartment, absent which the State has the burden of proving an exception to the search warrant requirements.

(2) Whether probable cause existed with or without a warrant to search the defendant's apartment.

(3) Whether the search of the defendant's apartment was conducted as incident to the arrest of Joseph Cathey.

(4) Whether the search of the defendant's apartment was pursuant to the defendant's freely and voluntarily giving consent.

(5) Whether the defendant, Joseph Cathey, requested an attorney so that all interrogation, including a request to search, should have been stopped thereafter.

(6) Whether oral statements made by the defendant, Joseph Cathey during and after his arrest, were free and voluntary so as to allow them to be admissible at his trial.

(7) Whether sufficient notice was given to defendant of the intent to use his inculpatory statements to give him time to prepare an adequate defense thereto.

(8) Whether Judge LeBrun abused his discretion in not allowing a recess in the hearing on the Motion to Supress to allow another witness to testify.

(9) Whether the prejudicial affect of the evidence of the defendant's prior conviction outweighed its probative value.

(10) Whether a defendant can conduct a full and proper voir dire absent the venire's arrest and conviction records, which are used by the State.

(11) Whether the Judge's actions concerning the defendant Joseph Cathey's opening statement prejudiced the presentation of his case.

(12) Whether Judge LeBrun's Comments on the evidence during the trial was sufficient to declare a mistrial.

(13) Whether insufficient evidence was submitted such that defendant's post verdict judgment of acquittal should have been granted.

(14) Whether in light of the evidence presented a verdict of guilty is consistent with the facts or should a new trial be ordered below.

FACTS:

Early in May of 1983, a complaint was lodged with

the Jefferson Parish authorities concerning possible narcotic violations and sex crimes involving the defendant. On May 3, 1983, a surveillance of the defendant's mobile home, located at Jefferson Downs, was conducted. At 11:30 a.m. Agent Kratzberg, accompanied by Sergeant DeSalvo, knocked on the door of the defendant's mobile home. The defendant answered, clad only in his underwear and pants, which were unzipped. A juvenile was present and she gave Agent Kratzberg a marijuana cigarette. The defendant was arrested for carnal knowledge of a juvenile, indecent behavior and distribution of marijuana to someone under eighteen. Agent Kratzberg read the defendant his rights twice and then, after obtaining consent from the defendant, searched the trailer. Agent Kratzberg then asked the defendant if he would consent to a search of his apartment, located at 710 Sunset Boulevard in Kenner, and the defendant stated that he would consent.

While Agent Kratzberg was arresting the defendant, Sergeant DeSalvo left the mobile home in an attempt to locate the defendant's girlfriend, Tonia Nolan. He went to Charles "Buddy" Genovese, the track superintendent, who called Ms. Nolan's office. After two or three phone calls, Genovese informed DeSalvo that Ms. Nolan was coming to speak to him. After a period of ten to fifteen minutes, during which Ms. Nolan did not appear, DeSalvo instructed Agents Pinnero and LaChute to proceed to and secure the defendant's apartment. DeSalvo then returned to the mobile home where Kratzberg informed him that the defendant had consented to a search of his apartment. Sergeant DeSalvo also called Colonel Miller and informed him that the defendant had been arrested. Miller then went to the mobile home.

DeSalvo and Genovese left Genovese's office and went to the defendant's mobile home. Genovese saw that the defendant was handcuffed and was wearing pants and shoes but no shirt. Genovese testified at the motion to suppress hearing that the defendant asked to use the phone and the officers told him he could use the phone after he was booked. There was no phone in the trailer but one could have been passed through the window. Genovese further testified that he did not hear the defendant request an attorney.

After receiving the call from DeSalvo, Agents LaChute and Pinnero went to the defendant's apartment. They knocked on the door but received no reply. Agent LaChute went to the apartment manager's office and obtained a key from the assistant manager. The officer then entered the apartment. Five minutes later, Ms. Nolan arrived. The officers identified themselves and then they and Ms. Nolan waited for the arrival of the defendant and the other police officers.

Agent Kratzberg, Sergeant DeSalvo, and Colonel Miller, along with other officers, transported the defendant to his apartment. The defendant was brought to a back bedroom where he was again advised of his rights. Agent Kratzberg and Colonel Miller asked the defendant for consent to search his apartment and Colonel Miller also advised the defendant that he did not have to consent. The defendant was then brought to the living room and allowed to converse with Tonia Nolan, after which he signed the consent form. Ms. Nolan signed the form as a witness. The defendant then led the officers to a green chest in a closet. He told the officers that if he had anything drug related it would be in that chest because he was a horse trainer and the chest contained veterinarian drugs used to treat horses.

The officers searched the chest and found Dilaudid tablets and five ampules of Demoral. The defendant told Agent Kratzberg that he knew the drugs were in the chest and that they had been given to him by a friend whose name and address he could not recall.

At trial, Technician Dureau was stipulated an expert in chemical analysis of drugs. He examined the yellow tablets and ampules seized from the defendant's apartment and concluded that the tablets were Hydromorphine (Dilaudid) and that the ampules contained Pethidine (Demoral).

ASSIGNMENTS OF ERROR

The defendant filed fourteen assignments of error in conformity with C.Cr.P. Art 844. In his brief the defendant argues fourteen assignments of error, however, these are not the same fourteen listed in his assignments of error. We will discuss the assignments of error as numbered and discussed in the defendant's brief. A comparison of the assignments of error and the brief show that the substance of all the assignments of error with the exception of listed assignment number ten, are argued in the brief. Assignment number ten is therefore considered abandoned. Uniform Rules of Court - Courts of Appeal - Rule 2.12-4, and *State v. Smith*, 452 So.2d 251 (La. App. 5th Cir. 1984).

ASSIGNMENTS OF ERROR NUMBERS ONE, TWO, THREE, AND FOUR

In assignments of error numbers one through four, the defendant alleges that the search of his apartment was illegal because (1) the officers did not have a warrant, (2)

probable cause to search the apartment did not exist, (3) the search was not justified as a search incident to the arrest of the defendant, and (4) the defendant did not give voluntary consent to search his apartment.

The testimony at the motion to suppress hearing and at trial shows that the police officers did not have a warrant to search the defendant's apartment. A search conducted without a warrant is per se unreasonable, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973) unless it is justified by one of the well defined narrow exceptions to the warrant requirements. *State v. Hernandez*, 410 So.2d 1381 (La. 1982). Where a defendant makes an initial showing that a warrantless search occurred, the State bears the burden of proving that the search is justified under an exception to the warrant requirement. *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969 (1970); *State v. Tatum*, 446 So.2d 29 (La. 1985).

One exception to the warrant requirement is a search made pursuant to a lawful arrest. *United States v. Watson*, 423, U.S. 411, 96 S.Ct. 820 (1976): *State v. Andriskok*, 434 So.2d 389 (La. 1983). The search shall be limited to the area within the defendants control, from which he can gain possession of weapons or act to destroy evidence. *State v. Krempel*, 471 So.2d 841 (La. App. 2nd Cir. 1985); *State v. Smith*, 477 So.2d 893 (La. App. 4th Cir. 1985) citing *State v. Andrishok*, supra.

In *Vale v. Louisiana*, supra, the United States Supreme Court stated that:

> If a search of a house is to be upheld as incident to an arrest, that arrest must take place

> inside the house, of. Agnello v. United States, 269 U.S. 20, 32, 46 S.Ct. 4, 6, 70 L.Ed 145, not somewhere outside - whether two blocks away, James v. Louisiana, 382 U.S. 36, 86 S.Ct. 151, 15 L.Ed.2d 30, twenty feet away, Shipley v. California, supra, or on the sidewalk near the front steps.

399 U.S. at 33-34, 90 S.Ct. at 1971.

In *State v. Perkins,* 451 So.2d 1146 (La. App. 4th Cir. 1984) evidence of two guns found under a mattress after the police had secured the apartment and arrested both occupants was held inadmissible because "at the time the officers returned to the bedroom, the area was no longer within the immediate control of any of the occupants of the apartment." *Id* at 1151. The reviewing court also suggested that if the police officers 'thought they had probable cause to search the apartment for additional evidence, they should have maintained their security and applied to a magistrate for a warrant to search." *Id.* at 1151.

Thus, it would appear that the search of the defendant's apartment cannot be considered a legal search incident to arrest.

One exception to the requirements of both a search warrant and probable cause for the search is a search conducted pursuant to consent. *State v. Raheem,* 464 So.2d 293 (La. 1985); *State v. Angel,* 356 So.2d 986 (La. 1978). In order to reply on this exception, the State must prove that the consent was freely and voluntarily given, as shown by the facts and circumstances of the individual case. *State v. Owen,* 453 So.2d 1202 (La. 1984); *State v. Ossey,* 446 So.2d 280 (La. 1984), Dennis, J. dissent 474 So.2d 440 (La. 1985), *cert. den. Ossey v. Louisiana,* ____ U.S. ____. 105 S.Ct. 293

(1984); *State v. David*, 425 So.2d 1241 (La.1983) appeal after remand 468 So.2d 1126 (La. 1984). The voluntariness of consent is a question of fact to be determined by the district court judge under a "totality of circumstances" test and his determination is entitled to great weight on appellate review. *State v. Wilson*, 467 So.2d 503 (La. 1985) *cert denied, Wilson v. Louisiana*, ____ U.S. ____, 106 S.Ct. 281 (1985); *State v. Ossey*, supra; *State v. David, supra; State v. Dunbar*, 356 So.2d 956) (La. 1978). The issue of consent turns on the credibility of the witnesses giving contradictory testimony as well as the circumstances surrounding the consent. *State v. Yarbrough*, 418 So.2d 503 (La. 1982); *State v. Cover*, 450 So.2d 741 (La. App. 5th Cir. 1984) *writ denied*, 456 So.2d 166 (La. 1984).

In the instant case, the consent to search the defendant's apartment first occurred after the defendant's arrest at his trailer. The defendant testified that his consent was obtained because the police officers pulled his shirt over his head and threatened to hit him with a tool resembling a tire iron. However, Agent Kratzberg, Sergeant DeSalvo and defense witness Charles Genovese all testified that the defendant was not wearing a shirt when he was arrested. Agent Kratzberg and Sergeant DeSalvo also testified that none of the officers had a tire iron.

After the police were finished at the defendant's trailor, they drove the defendant to his apartment. There, the State alleges, the defendant again consented to the search of the apartment.

Agent Kratzberg testified that once he and the defendant accompained by Sergeant DeSalvo and Colonel Miller, arrived at the apartment, he again advised the

defendant of his rights and the defendant again stated that he was willing to give his permission to search. The defendant then spoke with Tonia Nolan who also resided at the apartment and she stated she had no objection. The defendant then signed the consent to search form. Ms. Nolan and Colonel Miller signed as witnesses. Colonel Miller testified that while at the apartment, he advised the defendant that he did not have to sign a consent to search. The defendant stated that he wanted to cooperate but that he also wanted to speak with Ms. Nolan. After speaking with Ms. Nolan, the defendant signed the consent to search which was witnessed by Ms. Nolan and Colonel Miller.

The defendant alleges that he did not willingly consent to the search and that he was coerced into signing the consent to search form because six or seven police officers were present and because Ms. Nolan was in custody when he arrived at the apartment and he was told she would not be formally arrested if he consented to the search. However, Agent Kratzberg and Colonel Miller both stated that they did not tell the defendnat that they would not arrest Ms. Nolan if he consented to the search. In *State v. Burks*, 446 So.2d 681 (La. App. 5th Cir. 1985) *writ denied*, 468 So.2d 681 (La. 5th Cir. 1985) and *State v. Vinson*, 482 So.2d 48 (La. App. 5th Cir. 1986) the Court evaluated the validity of consent search where the defendant was under arrest at the time of the search.

> While the circumstances surrounding the signing of the consent form could indicate subtle coercion by the arresting agents, it is equally likely that the defendant could have concluded that it was in his best interest to cooperate. The record portrays the defendant as intelligent, streetwise, and articulate. After carefully reviewing the

> record, we find the defendant freely and voluntarily consented to the search of his house in order to secure certain advantages, concluding that it was in his best interest to cooperate with the law enforcement authorities.

State v. Burks, 466 So.2d at 686. *State v. Vinson*, 482 So.2d at 52. See also *State v. Bearden*, 449 So.2d 1109 (La. App. 5th Cir. 1984) *writ denied*, 452 So.2d 179 (La. 1984).

In this case, the trial court did not abuse its discretion in finding that the defendant's consent to search was freely and voluntarily given.

The defendant also appears to argue that the entry of Agents LaChute and Pinnero into his apartment was illegal and his consent to search was coerced through exploitation of that illigal entry. In support of this contention, the defendant cites *State v. Ragsdale*, 381 So.2d 492 (La. 1980). In that case, police officers entered the home of one Acott Girst to search for the defendant. The Louisiana Supreme Court held the entry illegal because the officers did not have probable cause to believe the defendant was present. After the illegal entry, Girst signed a consent to search form. During the search, methamphetamine was found. The Louisiana Supreme Court suppressed the evidence of the drug finding that the consent to search was coerced through exploitation of the prior illegal entry.

In this case, Agents LaChute and Pinnero were dispatched to the defendant's apartment to secure the premises prior to the arrival of the defendant and the police officers. Sergeant DeSalvo testified that he dispatched the agents when Ms. Nolan failed to arrive for questioning, fearing that she was enroute to the apartment to destroy

the evidence.

In *State v.Bearden*, supra this Court approved of a warrantless seizure to protect the evidence.

[the officers]

> had reasonable grounds to believe that if they had not taken swift action the contraband could have been moved and/or destroyed, and the supplier could have eluded prosecution. See **United States v. Thompson,** [700 F.2d 944, 950 (5th Cir.)]
>
> The officers were prudent and had reasonable cause to act as they did in view of the knowledge they already possessed and the circumstances presented to them. Therefore, we find that the seizure of the Arroyo residence (and even its search, if such had been the case) without a warrant was justified and legally valid. 449 So.2d at 1119.

Here, the record presents only the following testimony to determine whether the agents had probable cause to believe that the defendant's apartment contained illegal drugs: (1) Agent Kratzberg testified that Jefferson officials received a complaint in reference to possible narcotics violations and sex crimes involving the defendant. (2) Colonel Miller testified that an investigation was proceeding with reference to a juvenile individual that was supposedly getting some drugs from an individual out at Jefferson Downs. (3) That the defendant had given a juvenile a marijuana cigarette prior to his arrest and (4) that the defendant's live-in girlfriend did not appear at the track for questioning when informed that the defendant had been arrested.

We agree with the trial judge that the seizure of the defendant's apartment was necessary to prevent the possible destruction of evidence and the consent to search was freely and voluntarily given by the defendant.

Accordingly, Assignments of Error one through four lack merit.

ASSIGNMENT OF ERROR NUMBER 5

In his fifth assignment of error, the defendant alleges that his consent to search was obtained after he had requested counsel and therefore, the evidence seized in violation of his Sixth Amendment rights is inadmissible.

In *State v. Bourgeois,* 388 So.2d 359 (La. 1980) on remand 406 So.2d 550 (La. 1981) defendant was arrested and his suitcase was seized at the New Orleans International Airport. While the arresting officer was preparing a warrant application to search the suitcase, the defendant made a request to call an attorney. The defendant was advised that he could make the call after the search. The defendant then agreed to co-operate and asked what he could do. The arresting authorities responded that he could consent to the search. The defendant then signed the consent to search form. The Louisiana Supreme Court found the evidence from the search of the suitcase legal stating that:

> A person's sixth and fourteenth amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. *Kirby v. Illinois,* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Clearly, defendant's right to counsel had not attached at

the time his request was made. Nor was defendant being interrogated thereby involving his right to counsel upon request. *Miranda v. Arizonia*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Hence, Agent Egan's denial of his request was not improper.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER 6

In his sixth assignment of error the defendant alleges that the state did not prove that his remarks made to the police concerning the ownership of the green chest and the drugs found therein were made freely and voluntarily.

The defendant did not object to the testimony regarding these statements during the trial. C.Cr.P. Art. 891. In *State v. Guiden*, 339 So.2d 194) (La. 1981) *cert denied* 102 S.Ct. 1017, 454 U.S. 1150 (1981) the court held where the defendant had failed to raise the issue of the inadmissibility of his confession based on untimely afforded counsel at trial, he could not raise it for the first time on appeal.

Even had the defendant raised this issue, the defendant's statements are admissible. The defendant's actions in leading the police officers to the chest in the closet and telling them he was the owner of the truck were done spontaneously, and not in response to any questioning. Thus, the defendant's statements were admissable. *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER 7

In his seventh assignment of error the defendant alleges that the trial court erred in allowing the State to introduce evidence of oral inculpatory statements made by the defendant when the State did not give notice of its intent to use the statements until immediately prior to the trial and thereafter. The defendant alleges prejudice in that he was not given sufficient time to prepare a rebuttal.

C.Cr.P. Art. 768 provides:

> Unless the defendant has been granted pretrial discovery, if the state intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning the state's opening argument. If it fails to do so a confession or inculpatory statement shall not be admissible in evidence.

Prior to voir dire, the State informed the defense that the inculpatory statements it intended to use at trial were: (1) that the defendant told the police officer he had to speak to Tonia Nolen prior to consenting to a search of his apartment because she also lived in the apartment and (2) during the search, the defendant told Agent Kratzberg that all the drugs in the apartment were in a large green chest in the closet and that the chest belonged to him and contained drugs and vitamins for horses. At the start of the second day of trial, while voir dire was still being conducted, the State informed the defendant that they also planned to introduce the defendant's statement that the Dilaudid and Demerol found in the trunk belonged to a friend whose name he could not remember and who he didn't know how to contact.

The defendant makes no allegations of bad faith on the part of the State nor does he demonstrate any prejudice absent a general statement that he was not given time to prepare a rebuttal. It appears that the notices given on the first and second days of trial, prior to opening statement, were sufficient.

The purpose of the notice requirement of C.Cr.P. Art 768 is to prevent surprise and allow adequate time for the preparation of a defense. Reversal is not mandated when the defendant does not show that he was prejudiced by the State's failure to provide written notice. *State v. Parker,* 436 So.2d 495 (La. 1983). If a defendant merely asserts that he was "surprised", but offers nothing to show how he would have prepared for trial differently, a reversal is not warranted. *State v. Knapper*, 458 So.2d 1284 (La. 1984).

Also, when substantial compliance with the articles purpose has been met through other pretrial pleadings, the failure of the State to present notice will not bar introduction of the statement. *State v. Jackson,* 450 So.2d 621 (La. 1984); *State v. Sneed,* 316 So.2d 372 (La. 1975). A hearing on the free and voluntary nature of the defendant's statement or a hearing on a motion to suppress is sufficient to show that the defendant had actual notice of the inculpatory statements. *State v. Williams,* 416 S0.2d 914 (La. 1982).

Here, the defendant was made aware of the existence of the statements at the motion to suppress the evidence hearing. Also although the defendant alleges that he had insufficient time to prepare a rebuttal, he does not argue that he would have presented his defense differently had he been provided notice of statements.

This assignment is without merit.

ASSSIGNMENT OF ERROR NUMBER 8

In this assignment of error the defendant alleges that the trial court erred in denying his motion to hold open the motion to suppress hearing to allow testimony of a police officer who was not present due to his hospitalization following an operation.

After the trial of a hearing begins, the appropriate delay is a recess. C.Cr.P.Art. 708. A motion for a recess is to be evaluated by the same standards applicable to a continuance. *State v. Bice,* 407 So. 2d 1234 (La. 1981) footnote one; *State v. White,* 389 So.2d 1300 (La. 1980).

In order for the defendant to obtain a recess or continuance to secure the presence of a witness, he must show (1) the actual necessity for the witness and the materiality of his expected testimony, (2) a probability that the witness will be available at the time to which the trial is deferred and (3) due diligence in attempting to procure the witness for trial. C.Cr.P. Art 709; These requirements are strictly enforced by the courts.

State v. White, 472 So.2d 128 (La. App. 5th Cir. 1985). A denial of a motion for continuance is not grounds for reversal absent an abuse of discretion and a showing of specific prejudice. *State v. Cochran,* 463 So.2d 30 (La. App. 5th Cir. 1985) citing *State v. Benoit,* 440 So.2d 129, 133 (La. 1983).

In this case, the defendant argues that he was prejudiced when the trial court refused to hold open the hearing for the testimony of Agent Pinnero because the testimony of Pinnero's companion, Agent LaChute, and Ms. Bordelon, the assistant manager of the apartment

complex where the defendant lived, were in direct conflict. However, the testimony of both LaChute annd Ms. Bordelon indicates that Pinnero was not present in the office when LaChute and Ms. Bordelon discussed whether the officers had a warrant. Thus, it appears that the agent's testimony would not have been able to explain the conflict in LaChute's and Ms. Bordelon's testimony. The defendant also makes no showing of the materiality of Pinnero's expected testimony as per C.Cr.P. Art. 709. Accordingly, we find no abuse of discretion in the trial court's denial of the defendant's motion.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 9

The defendant alleges that the trial court erred in denying to suppress the evidence of his fifteen year old conviction for smuggling illegal aliens. The defendant alleges that the conviction was stale and irrelevant and the introduction of said conviction was prejudicial.

R.S. 15:495 provides:

> Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness, but before evidence of such former conviction can be adduced from any other source that the witness whose credibility is to be impeached, he must have been questioned on cross-examination as to such conviction, and have failed distinctly to admit the same; and no witness, whether he be defendant or not, can be asked on cross-examination as to such conviction, and have failed distinctly to admit the same; and no

> witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein.

Pursuant to R.S. 15:462, if the defendant takes the stand thereby becoming a witness "such witness shall be subject to all the rules that apply to other witnesses, and may be cross-examined upon the whole case." A defendant who takes the witness stand is subject to impeachment in the same manner as any other witness. *State v. Prather,* 290 So.2d 840 (La. 1974). "Louisiana jurisprudence has not limited impeachment testimony to recent crimes, nor to crimes indicative of the credibility of the testifying defendant." *State v. Hartman,* 388 So.2d 688, 693 (La. 1980); *State v. Prather,* supra.

In *State v. Hartman,* supra, the reviewing court affirmed the trial court's allowance of a twenty-year old conviction into evidence. In *State v. Clark,* 402 So.2d 684 (La. 1981) the reviewing court found no abuse of discretion in the trial court's refusal to exclude the defendant's convictions which occurred in 1951, despite the fact that the defendant was pardoned in 1976. In *State v. Ferdinand,* 441 So.2d 1272 (La. App. 1st. Cir. 1983), *writ den.* 445 So.2d 1233 (La. 1984) concurring opinion 465 So.2d 742 (La. App. 1st Cir. 1983) the reviewing court stated that it would not be improper for a court to allow the introduction of an eight year old conviction.

In the present case, the trial court did not err in allowing the introduction of the defendant's fifteen-year old conviction.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER 10

In this assignment of error the defendant alleges that the trial court erred in denying his motion for access to the computer records concerning the arrest and conviction records of the jury venire.

A defendant's motion for disclosure of the prior criminal records of a jury venire presents an issue analogous to that raised by a motion for the voting record of each prospective juror. *State v. Harvey,* 358 So.2d 1224 (La. 1978) or remand 369 So.2d 134 (La. 1979). *State v. Singleton,* 352 So. 2d. 191 (La. 1977); *State v. Hughes,* 436 So. 2d 677 (La. App. 4th Cir. 1983). *writ den.* 440 So.2d 732 (La. 1983). In order to obtain these records when they are in the possession of the prosecution, the defendant must make a showing that the records are necessary to prevent undue prejudice, hardship or injury to the defendant. *State v. Swift,* 363 So.2d 499 (La. 1978); *State v. Wright,* 344 So.2d 1014 (La. 1977); *State v. Blunt,* 449 So.2d 128 (La. App. 4th Cir. 1984). To make this showing, the defendant must demonstrate that he cannot practically obtain the information from sources other than the prosecution and that the State intends to use the information in selecting the jury. *State v. Swift,* supra; *State v. Singleton,* supra; *State v. Blunt,* supra; *State v. Hughes,* supra.

Although the State admitted it was in possession of the arrest records of the prospective jurors, the State did not indicate that it planned to use the information in selecting the jury. Thus it may be argued that the defendant did not show the State's intent to use the information. *State v. Blunt,* supra. However, the assistant district attorney's assertion that "the State can use whatever tools they want

in preparing their case and any type of criminal record" together with the State's questioning of each juror concerning any potential arrests may indicate that the State did use these records in selecting the jury. If such is the case the defendant need only show that he could not practically obtain the records by other means. *State v. Swift,* supra.

The defendant alleges that the arrest records of the jury venire are confidential and not subject to discovery. The defense may gather such information from the jurors themselves on voir dire examination. See *State v. Hughes,* supra and *State v. Holmes,* 347 So.2d 221 (La. 1977). The transcript of the voir dire elicited the information of the prospective juror's arrests and in that way made the information available to the defendant. The transcript also shows that the defendant made no attempt to question further the one person who had been sought from the prosecutor was not available through other means.

The defendant argues that requiring the defense to question the jurors about their possible arrest records is prejudicial to the defendant as it may offend the prospective juror. In *State v. Hughes,* supra, the court stated that "until defense counsel actually attempts to question the jurors and until he actually finds them to be alienated toward his client, his claim is premature." 436 So.2d at 679. The *Hughes* court then stated that:

> Since the voir dire, selection of the jury and the trial have all occurred, the defense counsel can not exercise his right. He must now show that by not obtaining the information on the jurors he was actually prejudiced by not having the information.

436 So.2d at 679.

In this case, the defendant makes no showing that he was actually prejudiced by not having the information.

The Louisiana Supreme Court's last consideration of this issue occurred in *State v. Jackson*, 450 So.2d 621, (La. 1984) relied on by the State in this case. The court noted that although the State admitted it had the criminal records of 230 prospective jurors and the defendant alleged he could not practically get these records from other sources, the defendant still was not entitled to the records. The Court said at 628-629:

> The state conceded it had the information on prospective jurors' criminal records and intended to use it in selecting the jury. Also, defendant asserts he could not practicably obtain the criminal records of the 230 prospective jurors from other sources. Defendant therefore argues that this non reciprocal advantage of the state offered his due process right to a fair trial. The trial judge denied defendant's motion for disclosure but permitted defendant to question the prospective jurors about their convictions, if any, but not about their arrests.
>
> The criminal records of prospective jurors may be useful to the state in its desire to challenge jurors with inclinations or biases to the purpose of defendant's voir dire: to challenge jurors whom defendant believes will not approach the verdict in a detached and objective manner. Whatever the practical desire of trial counsel, the recognized purpose of full voir dire is not to pack the jury with persons favorable to the defendant or to the state. Under the circumstances of this

case, defendant was not entitled to disclosure of the criminal records. Hence, the trial judge did not err in denying defendant's motion for disclosure.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 11

The defendant alleges that the trial court erred by requiring that the defendant make his opening statement after the first state witness had testified rather than at the start of defendant's case.

Immediately after the State's opening statement, the following occurred:

DEFENSE COUNSEL:

Your Honor, at this time, on behalf of my client, Bradley Cathey, I will reserve the right to make my opening statement until the State rests its case.

THE COURT:

You reserve your right to make an opening statement?

MR. AMATO:

Yes, your Honor, after the States's case, which I'm entitled to do.

THE COURT:

Okay.

The State called its first witness who testified and then was excused. The State's second witness was called, and during the testimony an objection was lodged which was discussed outside the presence of the jury. After the discussion, but prior to the continuation of the witness's testimony, the State raised an objection to the defense counsel's reservation of his right to make an opening statement at the close of the State's case. At one point during the discussion the following occurred:

DEFENSE COUNSEL - MR. AMATO:

... One is that my cliant has a right for me to make an opening statement; two, it's the Court's discretion if I make it after the State's case. The law doesn't say, you know, that I'll...

THE COURT:

Do I have a right to stop you from making it now?

MR. AMATO:

I don't think you do, now.

MR. HONIG:

No, your Honor, if he says that he wishes to make an opening statement, he has that right to make an opening statement.

MR. AMATO:

And I...

MR. HONIG:

But the Court can determine when that opening statement should be made. It can be made right now...

THE COURT:

I'm going to require that you make it now.

MR. AMATO:

Your Honor...

MR. HONIG:

Thank you, your Honor.

The Court:

Call the jury back in.

MR. AMATO:

How can I make it now in the middle of a witness...

THE COURT:

Step down, Mr. Witness and we'll put you back...

Mr. AMATO:

Well, I'll waive opening statement, then, you Honor, you know, it's just -- you know – and note my objection that it's in the Court's discretion. I think you could've said "Make it now or waive it..."

The discussion continued until the trial court

changed its ruling:

THE COURT:

> Well, what I believe -- if it's within my discretion, I believe it would only serve to destruct (sic) the jury and I will allow Mr. Amato to make his opening statement at the conclusion of the State's case. But, I will state that I do so only as a means of trying to ameliorate a situation which was brought about by this mis-information that I obtained from Mr. Amato, whether it is correct or not.

However, at the conclusion of the State's case, the defendant called his first witness making an opening statement. Thus it may be concluded that the defendant waived his opening statement. The defendant has the right to waive an opening statement. C.Cr.P. art 765; *State v. Seiss*, 428 So.2d 44 (La. 1983).

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 12

In this assignment of error the defendant alleges that the trial court erred in commenting on the evidence, thereby predudicing the jury.

At the trial, the folowing occurred:

BY THE STATE:

> Now, let me ask you a question, Did Mr. Cathey or Ms. Nolan provide you with any prescription for those -- for the Demoral or the Dilaudid?

AGENT KRATZBERG:

> No. Mr. Cathey stated to me he did not have a prescription for either of those two drugs, and he stated that he had gotten them from a friend.

MR. AMATO:

> Your Honor, I have an objection I'd like to tender out of the presence of the jury or at the Bench.

After discussion outside the presence of the jury regarding the admissibility of statements allegedly made by the defendant, the trial court instructed the jury:

> Okay, ladies and gentemen of the jury, I want you to disregard anything that attributed to the defendant as having said he had no prescription, and just disregard that entirely. But you do not necessarily have to disregard the fact that he had no prescription, according to the testimony of the -- no prescription was given to him or shown to him. Okay.

No further objection was made by the defendant.

Initially, it should be noted that the defense counsel did not object or move for a mistrial when the trial court admonished the jury and seeks to raise this issue for the first time on appeal. If the defendant fails to object to the comments at the time they are made, he waives his right to raise the issue on appeal. C.Cr.P. art. 841: *State v. Ellwest Stereo Theatres, Inc.*, 412 So.2d 594 (La. 1982); *State v. Gultry*, 471 So.2d 804 (La. App. 5th Cir 1985). C.Cr.P. art. 772 provides: "the judge in the presence of the jury shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the

testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted."

This article does not apply to the trial judge's reasons for rulings on objections relating to the admissibility of evidence, or to explain the purpose for which evidence is offered or admitted, provided the remarks are not unfair or prejudicial to the defendant. *State v. Knighten,* 436 So.2d 1141 (La. 1983) *cert denied Knighten v. Louisiana,* 465 U.S. 1051, 104 S.Ct. 1330 (1984); *State v. Williams,* 397 So.2d 1287 (La. 1981) remand for resentencing 414 So.2d 371 (La. 1982); *State v. Gultry,* supra. Also, the trial judge's comments on the evidence have been held to be harmless error if those remarks do not imply an opinion as to the defendant's guilt or innocence. *State v. Joseph,* 437 So.2d 280 (La. 1983); *State v. Felde,* 422 So.2d 370 (La. 1982) *cert denied. Felde v. Louisiana,* 461 U.S. 918, 103 S.Ct. 1903 (1983); *State v. Gultry,* supra.

Here the trial court was attempting to explain to the jury that they could not consider as evidence what the defendant said about his failure to provide a prescription but that they could consider the fact that there was no prescription.

The trial court was explaining to the jury what was admissible as evidence and what was not admissable. Also, the trial court did not imply am opinion as to whether he thought the defendant was guilty.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER 13

The defendant alleges that the trial court erred in

denying his post judgment verdict of acquittal because the State failed to prove "guilty" knowledge and because the State failed to introduce the actual drugs found during the search.

When reviewing the evidence to support a conviction, the standard to be used by the appellate court is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonabble doubt. *Jackson v. Virginia*, 443 So.2d 676 (La. 1984). Here the defendant was convicted of two counts of possession of a controlled dangerous substance in violation of R.S. 40:967. To support this conviction the State must prove that the defendant was in possession of the illegal drug and that he knowingly possessed the drug. The State need not prove actual possession. Constructive possession is sufficient to support the conviction. *State v. Trahan*, 425 So.2d 1222 (La. 1983). A person may be considered to be in constructive possession if the illegal substance is subject to his dominion and control. *State v. Trahan*, supra.

In the present case, the State introduced evidence to show that the drugs were found in a green chest in the defendant's closet and that the defendant told the searching agent that the drugs had been given to him by a friend. The defendant alleged that he did not know the drugs were in the trunk.

In this case, however, Agent Kratzberg testified that the defendant told him that he knew the drugs were in the chest. The defendant denied telling the officer that he knew they were there. The reviewing court may not negate or disregard the testimony of a witness merely because it is

contradicted by another witness. The trier of fact is the determiner of the credibility of witnesses. *State v. Arnaud*, 412 So.2d 1013 (La. 1982). Here the jury was entitled to believe the testimony of Agent Kratzberg. Given that testimony, a rational trier of fact could have found the defendant guilty of two counts of possession of a controlled dangerous substance.

The defendant also argues that the evidence to convict was insufficient because the State failed to introduce the actual drugs seized in the search of the apartment.

A similar issue was addressed by the Court of Appeal for the Second Circuit in *State v. Green*, 448 So.2d 782 (La. App. 2nd Cir. 1984). In that case a lab report was introduced to identify the drug seized as marijuana. At trial, the defendant objected, alleging that the State failed to establish a chain of custody when it failed to enter the marijuana into evidence. The trial court overruled the objection. On appeal, the defendant again alleged error, arguing that the marijuana itself was the best evidence and should have been produced under R.S. 15:436. The reviewing court found the argument meritless at 448 So.2d 786:

> The best evidence objection was not made in the trial court and cannot properly be raised on appeal. In any event, however, absent a showing of some prejudice to the defendant, the best evidence rule will not be applied unreasonable. *State v. Moore*, 419 So.2d 963 (La. 1982). The defendant has failed to show how he was prejudiced by the introduction of only the lab report and not the physical evidence itself. No reversible error is shown. This assignment lacks merit.

Here, at the close of the State's evidence, the defendant moved for a mistrial alleging that insufficient evidence existed to prove that the defendant had drugs and no chain of evidence existed. However, the State introduced the testimony of the officers who found the drugs and also the expert who analyzed the drugs. This is sufficient to prove that illegal drugs were seized from the defendant's apartment. in addition, the defendant makes no showing of prejudice resulting from the admission of the testimony rather than the drugs.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 14

In his last assignment of error the defendant alleges that the trial court erred in denying his motion for new trial urged on the ground that the verdict was contrary to the law and evidence. In support of this claim the defendant reargues his assignments of error. Because these assignments do not warrant reversal, the trial court did not err in denying the defendant's motion for new trial.

This assignment is without merit.

Accordingly, the conviction and sentence are affirmed.

AFFIRMED

APPENDIX B

STATE OF LOUISIANA	24TH JUDICIAL DISTRICT COURT
VERSUS	PARISH OF JEFFERSON STATE OF LOUISIANA
JOSEPH CATHEY AND TONIA NOLAN	NO: 83-1875 DIVISION: "I"
FILED: _____	_____ DEPUTY CLERK

MOTION TO SURPRESS EVIDENCE

NOW INTO COURT, through undersigned counsel, comes JOSEPH CATHEY, defendant herein, and moves the Court to suppress for use of evidence herein all objects or other property, documents, books, papers, investigations, reports, or any and all other writings presently in the possession of the State, the description of which is unknown to Mover, on the grounds that such were obtained through an unconstitutional search and seizure.

Respectfully Submitted,
AMATO & CREELY

_____

JACOB J. AMATO, JR.
901 Derbigny Street
P. O. Box 441
Gretna, La. 70054
Telephone: 367-8181

O R D E R

CONSIDERING the foregoing,

IT IS ORDERED that the State of Louisiana show cause on the _____ day of _____, 1983, at ____

o'clock ____m., why the foregoing motion should not be granted.

Gretna, Louisiana, this _____ day of _____, 1983.

_____

J U D G E

PLEASE SERVE:

District ATTORNEY'S OFFICE
PARISH OF Jefferson
STATE OF LOUISIANA

Filed
Dec 8 1983

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

	*	
STATE OF LOUISIANA	*	NO. 83-1875
VS.	*	
JOSEPH CATHEY	*	
AND	*	
TINIA NOLAN	*	DIVISION "I"

* * * * * * * * * * *** * * * * * * * * * *

Proceedings taken in the above captioned cause heard in open court at Gretna, Louisiana, before the Honorable Wallace C. LeBrun, Judge, presiding on May 16, 1984.

APPEARANCES:

Jacob Amato	Representing Mr. Cathey
Patrick McGinity	Representing Ms. Nolan
Erick Honig	Representing the State

Reported by: Laura A. Mesko OCR, CSR.

Well, I can put'em in the record.

(Short recess.)

(After recess.)

THE COURT:

Okay, the Court is -- I read the memorandum, which I take to be on behalf of both defendants.

MR. MCGINITY:

Yes, your Honor.

THE COURT:

I -- and the memorandum indicates to this Court, that there was argument that was made by counsel for both defendants to the effect that the evidence should be suppressed on several grounds.

One, that the consent was not freely given. Another to the effect that an arrest was made in one place and the consent was given in another place, and -- namely the motor home as opposed to the apartment.

I find that that's a question of fact, to be determined by one who listens. Mr. Amato stated in his argument, which he says was only argument, and which the Court agrees is only argument and not facts, that certain statements that were uncontradicted. That's not true, The Court heard the testimony of the officers, all of whom, were demanded to be heard by the defense.

And every one of them said too many things to make it im -- to make it so that the Court believes it would be most improbable that they'd be lying on all of those things.

The testimony that I heard was contrary to what Mr. Amato argued. They argued that there was consent that was freely given and all of them

testified to that effect, as far as the Court remembers. They testified that there wasn't any shirt on Mr. Cathey. That when they went in there all he had on was a pair of pants with his zipper open and no shoes and socks.

So Mr. Cathey testified that as a matter of fact, that he -- they pulled the shirt over his head, and that he -- you know, his visibility was obscured by the fact that the shirt was pulled over his eyes.

Every one of them testified that he didn't even have a shirt on.

Furthermore, the telephone conversation was the defense's own witness -- what was his name? Genovese. Mr. Genovese testified that he didn't hear anything about a telephone 'til after he was redirected by Mr. Amado and as the State says, he was instructed to what to say. And I believe that's what happened.

I'm -- I have heard throughout this case, contradictions, Miss Tonia Nolan testified that she was hysterical. Well, I've seen her in this Court throughout this proceeding and she seems cool as a cucumber to me, and not hysterical. I don't think that she was hysterical at all.

And testimony was that she -- by the police was, that she was in fact, willing for the consent to happen, to the search to be made and in fact, she testified as I recall, that she had no objections but that she didn't sign a consent deal until after Mr. Cathey had signed it, sometime. But she looked at the signature and thought that Mr. Cathey's signature looked kind of scribbly, as I -- something to that effect. That it wasn't his normal signature.

But, it indicates to the Court -- to me, that she did not know what it was that she was signing and that she did -- and I do believe that she gave oral consent. And that happened in the same place.

So therefore, the Court is of the opinion that the motion to suppress should and is therefore, denied.

MR. AMATO:

Your Honor, would you kindly note my objection on behalf of my client, Bradley Cathey.

THE COURT:

Yes sir.

MR. MCGINITY:

And also on behalf of Miss Nolan.

THE COURT:

So ordered.

MR. AMATO:

Your Honor, at this time, I'd like to ask that -- can I approach the Bench just for a second?

THE COURT:

Yeah, You want it to go on the record?

MR. AMATO:

No.

(Counsel approached the Bench.)

MR. AMATO:

Your Honor,, at this time, I'm gonna ask that the Court give us sufficient time to apply to the Fifth Circuit Court of Appeals for writs in this matter. And that, we will file notice of intention to apply for writs

STATE OF LOUISIANA	24TH JUDICIAL DISTRICT COURT
VERSUS	PARISH OF JEFFERSON STATE OF LOUISIANA
JOSEPH CATHEY AND TONIA NOLAN	NO: 83-1875 DIVISION: "I"

MOTION FOR POST-VERDICT JUDGMENT OF ACQUITTAL

NOW INTO COURT, through undersigned counsel, comes JOSEPH CATHEY, defendant herein, who respectfully moves this Court for a Judgment of Acquittal following the verdict of guilty returned on May 3, 1985, on both charges lodged against him, based on Article 821 of the Louisiana Code of Criminal Procedure. The defendant avers that under the ruling of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979), the evidence presented, when viewed in a light most favorable to the State, is insufficient to support a finding of guilt, for the reasons set forth in the Memorandum in Support filed herewith.

Respectfully Submitted,

AMATO & CREELY

/s/ Jacob J. Amato, Jr.

JACOB J. AMATO, JR.
DAVID W. BIRDSONG
901 Derbigny Street
P. O. Box 441
Gretna, La. 70054
Telephone: 367-8181

ORDER

CONSIDERING THE FOREGOING MOTION, the District Attorney is ordered to appear and show cause on the ____ day of _____, 1985, why the defendant's Motion for Judgment of Acquittal should not be granted.

Gretna, Louisiana, this ____ day of _____, 1985.

_____

JUDGE

PLEASE SERVE:

DISTRICT ATTORNEY
JEFFERSON PARISH

STATE OF LOUISIANA

VERSUS

JOSEPH CATHEY AND
TONIA NOLAN

24TH JUDICIAL DISTRICT
COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA
NO: 83-1875
DIVISION: "I"

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF MOTION FOR POST-VERDICT JUDGMENT OF ACQUITAL

MAY IT PLEASE THE COURT,

The United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), has set forth the standard followed by the Louisiana legislature in adopting Article 821 of the Louisiana Code of Criminal Procedure, for when a Judge can act to grant a Judgment of Acquittal after a verdict has been returned. This is a minimum standard which, should the evidence presented at trial fail to support, entitles the defendant to a verdict of acquittal, irregardless of the jury's decision. See *State v. Smith*, 441 So.2d 739 (La. 1983).

The evidence introduced at the trial herein was insufficient to convict the defendant when taken as a whole. First, because the State failed to prove that Joseph Cathey had any "guilty knowledge" as to the presence of the drugs found in his trunk and that they were controlled dangerous substances. See *State v. Trahan*, 425 So. 2d 1222, (La. 1983), and *State v. Perique*, 340 So.2d 1369, (La. 1976). The trunk contained numerous medicines for the treatment of

horses and was accessible by several different people. The burden is upon the State to prove that Mr. Cathey particularly knew that the drugs were in the trunk and that they were controlled dangerous substances and such facts are essential elements of the charges of which he was convicted. Absent any evidence to support these facts a reasonable doubt exists as to this particular element of his crime and a conviction cannot be based on the totality of the evidence presented with this particular evidence missing.

The evidence is also insufficient in that the State failed to introduce the drugs allegedly found in Mr. Cathey's apartment. The legal presumption that evidence under the control of a party and not produced by that party was not produced because it would not have aided him (L.R.S. 15:432) was not rebutted by evidence by the State and therefore must be given the legal presumption to which it is entitled. As a whole, the totality of the evidence is insufficient to support a finding of guilt and Mr. Cathey is therefore entitled to a verdict of acquittal from this Court as prayed for.

Respectfully Submitted,

AMATO & CREELY

/s/ Jacob J. AMATO, Jr.

JACOB J. AMATO, JR.
DAVID W. BIRDSONG
901 Derbigny Street
P. O. Box 441
Gretna, Louisiana 70054
Telephone: 367-8181

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

STATE OF LOUISIANA	*	NO. 83-1875
VS.	*	
JOSEPH CATHEY	*	
AND	*	
TINIA NOLAN	*	DIVISION "I"

* * * * * * * * * * * * * *

Proceedings taken in the above captioned cause heard in open court at Gretna, Louisiana, before the HONARABLE WALLACE C. LEBRUN, JUDGE, presiding on December 14, 1985

APPEARANCES:

Jacob Amato	Representing Defendant
Erick Honig	Representing the State

Reported by: Laura A. Mesko OCR, CSR.

PROCEEDINGS

MR. HONIG:

Your Honor, this is numbers 24 and 42:

Joseph Cathey.

THE COURT:

All right.

MR. AMATO:

Your Honor, at this time we have a couple of motions which are pending before the Court and before sentencing. I think the court has to dispose of them.

Your Honor, one is a motion for post verdict judgment of acquittal and I ask that the court at this time sit as the thirteenth member of the jury. And, under Article 821 of the Code of Criminal Procedure, it provides that the defendant may move for a post verdict judgment of acquittal following the verdict and motion for a post verdict judgment of acquittal, must be made and disposed of before sentencing, Your Honor. I'd like to point out to the Court,, sub-section B. "...A post verdict judgment of acquittal, shall be granted only if the Court finds that the evidence viewed in a light most favorable to the state, does not reasonably permit a finding of guilt".

I'd like to point out to the Court, two glaring errors that I think tha took place during the trial that the Court should consider with regard to this particular motion. One, is that the State during the trial in chief, did not produce the evidence in question, narcotics, which is allegedly the

defendant possessed. And, that they did not adequately explain why it was not produced in Court. And, that, you know, theoretically or technically, the State had no evidence before this Court or before the jury, with which to find the defendant guilty.

They talked about what they found; they talked about it being analyzed, but they never brought the evidence into Court. And, I think that the law is, is that its presumed that the person who was in possession of the evidence who doesn't produce it, it is presumed that its not what they say it is.

Your Honor, the other part of this motion deals with...that the State, failed to prove during the trial, and I think to perhaps the Court's satisfaction or able to prove that the defendant actually knowingly possessed the drugs in question, I think ...I think that the review of the testimony indicates that this man did not know what was in Payne Roy's foot locker that was in his apartment.

I think its clear that the testimony of my client, the testimony of Tanya Nolan, the testimony of the truck driver who was involved in bringing the stuff from North Louisiana, the man and his wife in North Louisiana where this stuff was picked up from, you know, clearly indicates that the objects which were stolen... which were in Mr. Cathey's apartment, were in fact, belonged to a third party.

Mr. Cathey's testimony indicated that he told the police that this wasn't his, that it in fact, belonged to a Payne Roy. Your Honor, I think that we have shown enough evidence which contradicts the testimony of the police or, at least, able to explain away the possession of

the drugs in question. That there is a reasonable appreciation that the Court can take that the man did not knowingly, possess any drugs.

And, here again, its the State's burden to prove that beyond a reasonable doubt and I think that the State failed to do that in this particular case, because what we have...what we had, was that the police searched an apartment, lo and behold, here's contraband in the apartment; ergo, my client's guilty of possession of it. I don't think that our construction provides...I think that the State has to go further than that.

Your Honor, at this time, that's the argument I have on the motion for--

MR. HONIG:

Your Honor, just a brief...briefly, to answer. Twelve jurors, sat through the trial, heard the evidence; they found that there was sufficient evidence to show that the defendant was in possession of those drugs, whether or not the drugs produced, they decided that he in fact, possessed drugs.

And, second of all, they found that there was enough evidence that he knowingly, intentionally, possessed the drugs. And, I believe after deliberation for a couple of hours, the defendant...the jury, 12 people on a jury, found that there was sufficient evidence; and it was a unanimous verdict, Your Honor. So, I believe that...I believe it was unanimous.

MR. AMATO:

I don't think we polled the jury, Your Honor.

MR. HONIG:

Even so, it had to be a unanimous verdict in a 6 person jury; I believe it was a 6 person jury. So, it had to be unanimous anyway. Or, 12 or 6 jurors, or whatever, they found that, and I don't believe the Court should take that verdict out of the hands of the jury.

MR. AMATO:

Your Honor, the only problem is, is that Article 821 of the Code says that its your obligation to take it. And if you feel that the state did not prove...and listening to the evidence most favorable to the State, you could overturn that verdict.

THE COURT:

According to what you just read me, Mr. Amato, you said that if the Court believes that the State has not proved the entirety of its case, considering the fact that anything in doubt has to be taken to light most favorable to the State. Okay, now, if I do that, that eliminates any doubt from me, 'cause the most favorable thing to the State is that they find what they said they found.

MR. AMATO:

But...

THE COURT:

Mr...and let me explain...Excuse me, Mr. Amato, lemme finish reading from this report, which I believe is something that Mr. Cathey, either shouldn't have said or he didn't realize what he said.

He said the subject is...I'm reading right from the report. He stated he knew that he had in his foot locker, which was in the closet and there were no illegal drugs in the foot locker. The subject, that is, Mr. Cathey, feels that the mother of the alleged victim in the carnal knowledge of a juvenile, charge, must have told the police that he had illegal drugs in his residence. That's his prerogative to believe what he wishes.

The subject stated again, that he knew what he had in his foot locker and that there were no illegal drugs in that locker. He stated that for all he knew, Mr. Payne Roy owned the drugs. He stated that if Payne Roy did not own the drugs, then they must have been planted by the Jefferson Parish Sheriff's Office.

You know, so on the one hand he said he knew it wasn't there and then right in the next sentence he says if it was there, it must have been Mr. Payne Roy's stuff. So, it had to... he had...you have to admit that the possibility exist that he knew it was there.

MR. AMATO:

Your Honor, I think...

THE COURT:

And, if he knew it was there, he knew and knowingly possessed it.

MR. AMATO:

I think that...

THE COURT:

Now, I'm going to tell you something about this case that really... that really is impressive to me.

I have here a packet of letters, which I think exceeds 50, in number...

MR. AMATO:

Yes, Your Honor.

THE COURT:

and it seems as though there was a coordinated plan to have people write, because a lot of them wrote almost verbatim the same thing, you know, like as if somebody told them write this, and they wrote that.

Some of the people that wrote 'em, are respected people of the community; business people and so forth. I have letters that say that Mr. Cathey is a very imminent horse trainer. One of them says that they think he's one of the top three people in...at Jefferson Downs. That he works very hard, diligently, and so forth. But, we also have the problem, that if we come to who we believe, Mr. Cathey, is a formerly convicted felon, which I think he did a dastardly thing, by helping to bring in foreigners across the border, you know, for which he was convicted. Of course, that was some 10 or 12 years ago.

MR. AMATO:

Fourteen years ago, Your Honor.

THE COURT:

Well, whatever, it was a long good while ago, and I think he's paid his penalty for that. But, at the same time, it has a bearing on whether...if

there's a credulity situation involved, I cannot believe him over an officer, who admittedly doesn't have any reason to go against him. None of them has been told to me, that there's a reason for the narcotics agents to fake the situation and plant the stuff in his house. You know, I can't explain it. I can't explain why he didn't demand a search warrant; I can't demand...understand a lot of things. But, at the same time, you know, I find that the verdict of the jury, I should not change, you know. So, if you have something to say for the record, Mr. Cathey, I'd be happy to listen to what you say...

MR. AMATO:

Your Honor, I have another motion too. I take it by that, that you have overruled my motion for a post verdict...

THE COURT:

Yes, sir, that's fair...

MR. AMATO:

...I'd like that you note my objection, Your Honor, for the record...

THE COURT:

Yes, sir, I do note your objection for the record.

MR. AMATO:

Your Honor, we have also another motion for a new trial under Article 851, which is different than the Motion for Post Verdict Judgment of Acquittal, under 821. And, at

this time, Your Honor, I'd like to read that Article to the Court.

THE COURT:

All right.

MR. AMATO:

"...That the Motion for a new trial was based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case, the motion shall be denied, no matter what the allegation is grounded. The Court on the motion of the defendant, shall grant a new trial whenever; the verdict is contrary to the law and the evidence:. Your Honor, I think here again, we get to the ...to the question of, you know...

THE COURT:

Whether it is or not.

MR. AMATO:

...you know, basically, that they didn't produce any evidence. That they also failed to show that this man actually possessed it of it and it being... you know, its just like if someone found drugs in this courtroom, is it your drugs? you know, I think the state has to do more than that. I understand that; that takes it to some extreme, considering that an apartment is...or, my house, you know, or your house. But, Your Honor, I think that the State has that additional burden to show that this was knowingly and intentionally done on Mr. Cathey's part, that he possessed these drugs.

Your Honor, also, the article provides that; "...The

court's ruling on a written motion or objections made during the proceedings, show prejudicial error". Your Honor, I'd like to point out to the Court, that we've still have alleged and continue to allege, that the search of the defendant's apartment, was an illegal search and seizure, and therefore, that any evidence gained, should have been suppressed, which this Court has overruled.

THE COURT:

You've already done that. That's in the record, isn't it?

MR. AMATO:

Yes, Your Honor, its in the record.

Your Honor, there's also in our motion for a new trial, that there was some testimony that came out and I would like to, if I could, point it out to the court, where the court commented on the evidence. On page 49 of the trial transcript...this is a quote, Your Honor. "...Did Mr. Cathey or Miss Nolan provide you with any prescriptions for those,for the demoral or delaudid?" Trial transcript, May 2nd, proceedings, page 49. To which, Agent Kratzberg answered as follows: "...No, Mr. Cathey stated to me that he did not have a prescription for either of those two drugs and he had stated that he'd gotten them from a friend"; and, that's the trial transcript. I objected to the above testimony on the basis, the witness testified to an oral statement of Mr. Cathey, without the state giving written notice to use of such statement. In response to this, the trial court issued the following admonition to the jury. "...Okay, ladies and gentlemen of the jury, I want you to disregard anything that is attributed to the defendant as having said he had no prescription and just---just regard that entirely. But, you do not necessarily have to disregard

the fact that he had no prescription, according to the testimony of...no prescription was given to him or shown to him. Okay?" Your Honor, I ask that that admonition to the jury was highly prejudicial and when you commented, you do not necessarily have to disregard the fact that he had no prescription', Your Honor, that's prejudicial to the defendant. It might well have been the reason why the jury found the defendant guilty, was the court's com...I'm sure it wasn't done intentionally, but, you know, it well might have been the straw that broke the camel's back. And, I think the court should take that into consideration in weighing whether a new trial should be given or not.

Your Honor, I again point out, that the State failed to produce any evidence, the vials of demoral, or delaudid or the tablets or whatever ...Whatever, they said they took from the defendant.

Your Honor, also that there was... at the beginning of the trial, when the state informed us that they were going to attempt to use oral statements of defendant, I asked that the court limit the oral statements. that the state intended to prove or to introduce, since it was my experience with these particular officers, that they would say whatever needed to be said.

And, I think that the...that they, you know, went over what they court had allowed to come in as oral statement of the defendant. I think that the court needs to review the transcript in order to determine that.

Your Honor, also that the state failed to show that the statements that the defendant,...prior to their introduction,the state failed to show that they were freely and voluntarily given. The state just put the police officers on the stand and just whatever they testified to without a foundation...a proper foundation, being laid, that they were

freely and voluntarily given. I think also, Your Honor, that the court, under this particular Article has a discretion, that this is why the people of this parish have elected you to be the judge, Your Honor. Its your job to sit there and weigh what went on and what didn't go on and which you're aware of, and if you feel that you have that feeling in your heart, that something didn't go right in this trial, then its the court's obligation under this article to grant a new trial. And, I'll read, Your Honor..."...When the court is of the opinion that the ends of justice would be served by granting of a new trial, although the defendant might not be entitled to a new trial as a matter of strict legal right;. That is, Your Honor, if you feel that as an accumulation of all of these thing that I've pointed out to the court, that a miscarriage of justice has taken place as we've alleged, that its your obligation as a judge, and your duty as a judge, to say, well, we're going to cure it and we're going to grant the man a new trial; which we're asking you to do at this time.

Thank you, Your Honor.

MR. HONIG:

The State would submit it on the previous argument, Your Honor.

THE COURT:

Okay. Your argument is very... very well thought out and planned.

MR. AMATO:

Thank you, Your Honor.

THE COURT:

However, I want to tell you that I don't have a doubt in my mind that Mr. Cathey is guilty. The Articles that you read to me indicate that these has to be something that the court is convinced of a miss...miss---carriage of justice and that the state's evidence was insufficient; I don't believe that.

I know we have a difference of opinion, but I am sworn to abide by my own opinion, based on the evidence that I heard. With regard to the admonition that I made to the jury, I think that what I did was correct in telling them to disregard it and I informed them at the time to disregard that entirely. If the court of appeals or the Supreme Court thinks that what I did was erroneous to the point that it would make a difference in the outcome of the trial, they have the right to do that, to change it. And, this is not the final salvo of the battle; you know that and I know that. But, at the same time, I don't feel as though I can justifibly accede to your request, although I have a great admiration for your ability, and I also deeply respect you as a person...

MR. AMATO:

Thank you, Your Honor.

THE COURT:

I cannot...I cannot sacrifice my own feelings. And, if I did, I would be less of a man then I would like you to be.

MR. AMATO:

I agree, Your Honor.

THE COURT:

And, so, I have to rule in accordance to what I believe is correct. If I'm wrong, then I ask the forgiveness of God in Heaven and everybody involved, because I know I'm not doing it maliciously and I'm not doing it in any way, without some very serious thought. This matter was continued at the request of the defendent, 3 times, so that I would have more chance to study this thing. And, for your information, I studied it last night until midnight, because I was looking for something, that if I was wrong, I would like to correct it. I don't think I am. But, you know, that's the way the situation comes to be, sometimes. And, so, therefore, I'm going to, at this time, sentence Mr. Cathey to the Louisiana Department of Corrections...

MR. AMATO:

Your Honor, I would like to note...

THE COURT:

...and I'm going to sentence him to 3 years at hard labor, plus a fine of $5,000 and costs. And, of course, I'm willing to allow him to be out on bond while you have an appeal, 'cause you have a right of appeal since the sentence is less than 5 years.

MR. AMATO:

Your Honor, I'd like to just to make the record complete, note my objection to the court's overruling my motion for a new trial and I'd also object to the sentence that the Court has imposed. And, Your Honor, I am fully aware of the... the effort and soul searching that this is...you know, I thank the court. I know you've taken some time and some consideration and I appreciate that...

THE COURT:

Okay, thank you. I appreciate your...

MR. AMATO:

...amd my client appreciates it, Your Honor...

THE COURT:

...I appreciate that, but I just have my own feelings and my own conscience that I have to deal with.

MR. AMATO:

Your Honor, I have...

THE COURT:

And, I also respect Mr. Cathey's position as a well regarded trainer; all these letters couldn't be for nothing, you know.

MR. HONIG:

Your Honor, may I just question one thing? There's two counts, is this 3 years that are concurrent or is it one and a half on each count?

THE COURT:

No, its going to be 3 years to be concurrent.

MR. HONIG:

Three years on each count, concurrent then.

THE COURT:

Right.

MR. AMATO:

Your Honor, I have a written motion and I ask that the court...for releasing the defendant out on bond and I have a bondsman present, Your Honor, to make ...hopefully to make the bond.

THE COURT:

Okay.

MR. AMATO:

Your Honor, I have a motion for an appeal at this time and ask the court to sign same; it has to be filed before all the other motions...

THE COURT:

A motion for appeal? You've got to do it now, they changed the law. You know, you've got to do it within 45 days after the...all the costs are paid for the transcript and all.

(colloguy)

MR. AMATO:

Thank you, Your Honor.

APPENDIX C

The Supreme Court Of The State Of Louisiana

STATE OF LOUISIANA

VS. No. 86-K - 2054

JOSEPH CATHEY

- - - - - -

IN RE: Cathey, Joseph; Applying for Supervisory Writs of Certiorari, Prohibition and Mandamus; to the Court of Appeal, Fifth Circuit, Number 86-KA-111; Parish of Jefferson 24th Judicial Distsrict Court Div. "I" Number 83-1875

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January 23, 1987

Denied.

HTL
JAD
PFC
WFM
JLD
JCW
LFC

Supreme Court of Louisiana
January 23, 1987

/s/ illegable

Clerk of Court
For the Court

APPENDIX D

AMENDMENT IV

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizen of the United Staates; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.